

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

In re:	§	Case No. 09-38882-H1-13
Warren A. Anderson	§	Chapter 13
_____	§	
	§	
Warren A. Anderson	§	
Plaintiff	§	
vs.	§	Adversary No.
	§	
Bank of New York Mellon Trust Company,	§	
N.A., as Trustee for Texas Department of	§	
Housing and Community Affairs	§	
Defendant	§	
_____	§	

**COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY  
INJUNCTION AND PERMANENT INJUNCTION AND DECLARATORY  
JUDGMENT TO VACATE FORECLOSURE**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

COMES NOW, Warren A. Anderson, Plaintiff, and files this Complaint against Bank of New York Mellon Trust Company, N.A., as Trustee for Texas Department of Housing and Community Affairs, Defendant, seeking for declaratory judgment to vacate foreclosure , and would respectfully show the Court:

**A. Jurisdiction**

1. On November 23, 2009 Plaintiff filed for relief under chapter 13 of the Bankruptcy Code under case no. 09-38882-H1-13.

2. This Court has jurisdiction pursuant to 28 U.S.C. §§ 157(b), 1334 and 2201. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(I)-(J). Plaintiff seeks injunctive relief and declaratory judgment in accordance with Rule 7001 of the Federal

Bankruptcy Rules of Procedure, Rules 57 and 65 of the Federal Rules of civil procedure and 11 U.S.C. § 105.

### **B. Parties and Service**

3. Defendant Bank of New York Mellon Trust Company, N.A., as Trustee for Texas Department of Housing and Community Affairs, is a national banking association which may be served with service pursuant to Rule 2002 of the Federal Bankruptcy Rules of Procedure.

### **C. Statement of Facts**

4. On November 7, 1985 Plaintiff purchased real property located at 6438 Coachwood Drive, Houston, Texas (“Residence”), more particularly described as follows:

Lot Ten (10), Block One (1) of SOUTHWOOD PLACE,  
SECTION FOUR (4), Harris County Texas, according to  
the map or plat thereof recorded in Volume 253, Page 1 of  
the Map Records of Harris County, Texas.

5. As consideration for the loan to purchase the Residence, Plaintiff executed a promissory note (“Note”) dated November 7, 1985 in the original principal amount of \$76,000.00 payable to the order of Allstate Enterprises Mortgage Corporation.

6. As security for the Note, Plaintiff executed a Deed of Trust of even date therewith covering the Residence.

7. Since purchasing the Residence on November 7, 1985 Plaintiff has continuously occupied the property as his homestead.

8. During the applicable period of time, Defendant was allegedly the holder of the Note.

9. At a foreclosure sale allegedly conducted on October 6, 2009, Defendant purchased the Residence for \$33,750.00.

**D. Arguments**

10. Plaintiff contends that the foreclosure sale should be vacated for four reasons.

11. First, Plaintiff contends that Defendant acted in bad faith in conducting the foreclosure sale. At the urging of Defendant, for the period of almost one year Plaintiff engaged in substantial discussions with the Defendant's alleged loan servicer Dovenmuehler Mortgage ("Loan Servicer") in an attempt to avoid foreclosure by either curing the alleged monetary default by forbearance or modifying the Note. Plaintiff submitted all the documentation requested by the Loan Servicer. Further, Plaintiff was told by agents of the Loan Servicer not to make any loan payments while the Plaintiff's request for forbearance/loan modification was being processed. During this time Plaintiff was not informed that a foreclosure sale was pending. Plaintiff did not receive Defendant's alleged written notice of the foreclosure sale. However, instead of processing the promised forbearance/modification in good faith, Defendant and/or Defendant's agents engaged in bad faith conduct to deceive Plaintiff in order to foreclose on the Residence.

12. Second, the foreclosure process was defective and such defects coupled with the grossly inadequate foreclosure price are grounds to vacate the alleged foreclosure sale of the Residence. Upon information and belief, Plaintiff alleges that the alleged notice of default, required by the Deed of Trust prior to acceleration of the Note, was improper.

13. Third, Bruce M. Badger, the substitute trustee who allegedly noticed and conducted the foreclosure sale, was not properly appointed as substitute trustee (as required by the Deed of Trust) prior to noticing and conducting the alleged foreclosure sale.

14. Although the value of the Residence valued by the Harris County Appraisal District at \$89,200.00, Defendant alleged purchased the Residence at the foreclosure sale for only \$33,750.00.

15. Fourth, the recent United States Supreme Court case of *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 164 L.E.2d 415 (2006) held that a non-judicial foreclosure sale conducted similar to the sale allegedly held in this case, violated the 14<sup>th</sup> Amendment to the United States Constitution. Upon information and belief, Plaintiff alleges that the ultimate beneficiary of the Note, the Texas Department of Housing & Community Affairs (“Department”), is an agency of the State of Texas, and hence, the alleged foreclosure sale of the Residence was state action as defined by the 14<sup>th</sup> Amendment of the United States Constitution and therefore, subject to the holding in *Jones v. Flowers*. The Department acts for the State of Texas. Texas Government Code § 2306.053(b)(2).

16. Unless Defendant is temporarily restrained from evicting Plaintiff and the alleged foreclosure vacated, Plaintiff will suffer immediate, irreparable injury, loss or damage because of the unique nature of the Residence. Attached as Exhibit A is the Affidavit of Plaintiff, attesting to the injury Plaintiff will suffer unless a temporary restraining order is issued.

WHEREFORE, Warren A Anderson, Plaintiff, prays:

1. Pursuant to Rule 65 of the Federal Rules of Civil Procedure, as incorporated by Federal Rule of Bankruptcy Procedure 7065, the Court issue a temporary restraining order, restraining the Defendant, the Defendant's attorneys, agents and employees and successors from evicting the Plaintiff from the Residence;
2. The Court issue a preliminary and permanent injunction enjoining the Defendant, the Defendant's attorneys, agents and employees and successors from evicting the Plaintiff from the Residence;
3. The Court issue a declaratory judgment that the alleged October 6, 2009 foreclosure sale of the Residence to Defendant be vacated and title to the Residence restored to Plaintiff;
4. The Court award Plaintiff attorney's fees for bringing this complaint for declaratory judgment; and
5. Such other relief which the Court deems just.

Respectfully submitted,

/s/ Thomas F. Jones, III  
Thomas F. Jones, III  
Texas Bar No. 10974400; SDN 4048  
18333 Egret Bay Blvd, Suite 120  
Houston, Texas 77058  
Telephone: (281) 335-7744  
Facsimile: (281) 335-4774  
ATTORNEY FOR PLAINTIFF

OF COUNSEL: BAILEY & GAYLEN